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In the Supreme Court of the United States

OCTOBER TERM, 1989

W.S. KIRKPATRICK & CO., INC., ET AL., PETITIONERS

v.

ENVIRONMENTAL TECTONICS CORPORATION, INTERNATIONAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the act of state doctrine should be applied to bar a private civil action brought under United States law by a United States corporation that was the disappointed bidder for a military construction contract awarded by the Government of Nigeria, seeking to recover damages from another United States corporation that allegedly obtained the contract as a result of paying bribes to Nigerian officials.

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First National City Bank v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) 38
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Grand Jury Proceedings, In re, 817 F.2d 1108 (4th Cir.), cert. denied, 484 U.S. 890 (1987) 40
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Cases—Continued: Page

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Ramirez de Arellano v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C. Cir. 1986) 38
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Republic of the Philippines v. *Marcos*, 806 F.2d 344 (2d Cir. 1986), cert. denied, 481 U.S. 1048 (1987) 40
Republic of the Philippines v. *Marcos*, 862 F.2d 1355 (9th Cir. 1988), cert. denied, 109 S. Ct. 1933 (1989) 39-40
Ricaud v. *American Metal Co.*, 246 U.S. 304 (1918) 9, 13, 14

Cases—Continued: Page

Sage Int'l v. *Cadillac Gage Co.*, 534 F. Supp. 896 (E.D. Mich. 1981) 36
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 21
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Underhill v. *Hernandez*, 168 U.S. 250 (1897) 6, 11
United States v. *Belmont*, 301 U.S. 324 (1937) 14
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 1, 29
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Zschernig v. *Miller*, 389 U.S. 429 (1968) 38

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Foreign Corrupt Practices Act of 1977, 15 U.S.C. 15 U.S.C. 78dd-1 *et seq.*:
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15 U.S.C. 78dd-2 ..... 1, 2, 35
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15 U.S.C. 78dd-2(a)(2) 33
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28 U.S.C. 1605(a)(2) 27
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§ 2(c), 15 U.S.C. 15 21
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Pub. L. No. 95-213, 91 Stat. 1494:
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§ 104, 91 Stat. 1496 33
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18 U.S.C. 1341 20
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Statutes—Continued: Page

D. Kingdon, *The Laws of the Federation of Nigeria and Lagos,* Criminal Code, ch. 42 (1958):
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§ 104 22
H.H. Marshall, *The Laws of Northern Nigeria,* ch. 89, §§ 115-122 (1965) 21-22

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122 Cong. Rec. (1976):
p. 12,605 35
p. 12,607 35
123 Cong. Rec. (1977):
p. 38,602 36
p. 38,778 36
J. Dellapenna, *Deciphering the Act of State Doctrine, Manuscript* (1989) (to be published in 35 Vill. L. Rev.) 9, 24
T. Elias, *The Nigerian Legal System* (1963) 25
H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) 28
H.R. Rep. No. 640, 95th Cong., 1st Sess. (1977) 34, 35, 36
Henkin, *Act of State Today: Recollections in Tranquility,* 6 Colum. J. Transnt'l. L. 175 (1967) 9
Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 Va. J. Int'l L. 685 (1976) .. 9
Note, *Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases,* 59 Notre Dame L. Rev. 455 (1984) 37
Note, Clayco Petroleum Corp. v. Occidental Petroleum Corp.: *Should There Be a Bribery Exception to the Act of State Doctrine?,* 17 Cornell Int'l L. J. 407 (1984) 37
J. Orojo, *Nigerian Commercial Law & Practice* (1983) 24
Restatement (Second) of Judgments (1982) 24
Restatement (Third) of the Foreign Relations Law of the United States (1987) 9

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S. 3379, 94th Cong., 2d Sess. (1976) 35
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S. Rep. No. 114, 95th Cong., 1st Sess. (1977) 33, 35
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INTEREST OF THE UNITED STATES

The act of state doctrine is based on principles of comity among nations and the proper distribution of functions between the judicial and political Branches in the area of foreign affairs. As the "constitutional representative of the United States with regard to foreign nations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), the Executive Branch has a vital interest in proper application of the doctrine. The United States also enforces the federal laws under which respondent's suit arises, as well as the Foreign Corrupt Practices Act, 15 U.S.C. 78dd-1 and 78dd-2, which prohibits bribery of foreign officials.

STATEMENT

1. In 1980, petitioner Carpenter, the Chairman and Chief Executive Officer of petitioner W.S. Kirkpatrick & Co., a New Jersey corporation, learned that the Nigerian Government planned to construct an aeromedical

center for its Air Force.[1] Carpenter hired a Nigerian national, petitioner Akindele, to act as Kirkpatrick's local agent in procuring the contract. Akindele informed Carpenter that Kirkpatrick should be prepared to pay a "sales commission," totalling 20% of the contract price, to Nigerian political and military officials. Kirkpatrick and Akindele agreed that, if Kirkpatrick received the contract, it would pay the "commission" through two Panamanian corporations established by Akindele. Respondent, a Pennsylvania corporation, also bid for the contract.

In March 1982, the contract was awarded to a subsidiary of Kirkpatrick. The Nigerian Government made four payments to Kirkpatrick under the contract in 1982 and 1983. On each occasion, Kirkpatrick, through use of the mails or wires, paid a portion of the promised "commission" to Akindele's Panamanian corporations, which distributed them to the intended recipients. Kirkpatrick paid more than $1.7 million under this arrangement. After learning that its bid had been far lower than Kirkpatrick's, respondent reported its findings to the Nigerian Air Force and the United States Embassy in Lagos. Carpenter and Kirkpatrick subsequently pleaded guilty to one count of violating the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-2, based on one of the four payments.[2] In connection with their pleas, Carpenter and Kirkpatrick stipulated to an offer of proof that outlined the agreement between Carpenter and Akindele and the payments made to the Panamanian corporations, but did not state that money had actually been paid to Nigerian officials (J.A. 17-20, 35-38). Pet. App. A4-A7, A43-A44.

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[1] The statement of facts is taken from the opinions below, which are based on allegations in the complaint. Pet. App. A4 n.1.

[2] The count charged Carpenter and Kirkpatrick with using an international telex in furtherance of the payment, while having reason to know that a portion of the money would be offered, promised or given to governmental and party officials in Nigeria for the purpose of inducing them to use their influence to obtain the contract for Kirkpatrick. J.A. 15-16, 33-34.

2. Respondent then brought this suit seeking to recover damages from Kirkpatrick and the other petitioners under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968; Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c); the New Jersey Anti-Racketeering Act, N.J. Stat. Ann. §§ 41-1 to 41-6.2 (West 1982); and the common law of interference with prospective contractual relations. Petitioners moved to dismiss the complaint on the ground that the suit is barred by the act of state doctrine. In response to the court's request for the views of the Department of State, the Legal Adviser stated in a letter that the United States had taken the position in its amicus briefs at the petition stage in *Mitsui & Co.* v. *Industrial Development Corp.*, 445 U.S. 903 (1980), and *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977), that inquiries into the motivation (as distinguished from the validity) of the official acts of a foreign sovereign are not barred by the act of state doctrine (Pet. App. A34-A37). Adhering to that view, and based upon his understanding that "the validity of the Nigerian Government's decision to award the contract * * * is not in question," the Legal Adviser stated that the act of state doctrine would not bar the court "from adjudicating this dispute." He cautioned, however, that "inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations," and he urged the court "to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial." *Ibid.*[3]

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[3] Counsel for respondent requested a declaration from the Nigerian Embassy in Washington that the prosecution of this action "will not have any impact whatsoever on the relations between the Republic of Nigeria and the United States of America" (Pet. App. A45; J.A. 124-132). The Nigerian Government did not respond to that letter; nor, apparently, has it repudiated the contract or taken any other action in response to the allegations (Pet. App. A45, A62 n.14; see J.A. 143-144, 173, 175).

After receiving the Legal Adviser's letter, the court dismissed the suit (Pet. App. A38-A73), holding it barred by the act of state doctrine (*id.* A53-A66). The court noted that in order to prevail, respondent must demonstrate that petitioners "intended to wrongfully influence the award of the Nigerian contract by payment of a bribe, that the Government of Nigeria, its officials or other representatives knew of the offered consideration for awarding the Nigerian contract to Kirkpatrick, that the bribe was actually received or anticipated and that 'but for' the payment or anticipation of the payment of the bribe, respondent would have been awarded the Nigerian contract" (*Id.* at A55-A56). Because "the indispensible ingredient of [respondent's] cause of action requires establishing the involvement of the Government of Nigeria, its officials or representatives in corrupt activities which violate Nigerian law," the court believed the suit would "question[]," either "directly or collaterally," the acts of a foreign sovereign (*id.* at A57-A58). The court believed such an inquiry might embarrass the political Branches, or make relations with Nigeria more difficult, by impugning the integrity of decisions of Nigerian officials (*id.* at A55, A56, A58, A64-A65).

The district court rejected respondent's contention that the FCPA prosecutions of Carpenter and Kirkpatrick created an exception to the act of state doctrine, noting that the offer of proof in the FCPA case did not establish that bribes had actually been paid to Nigerian officials (Pet. App. A61-A62). The court likewise concluded that the Legal Adviser's letter did not bring this case within the "*Bernstein* exception" to the act of state doctrine,[4] which has been invoked where the Executive Branch represents that application of the doctrine would not advance the interests of United States foreign policy (*id.* at A62-A65). The court reasoned that, although the Legal Adviser took the position that the doctrine is in-

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[4] See *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954).

applicable in this case, he acknowledged that "inquiries into the motivation and validity of actions by foreign states * * * may seriously affect United States foreign relations" (*id.* at A63).

3. The court of appeals reversed (Pet. App. A1-A37). It recognized that the award of a military procurement contract can be a sufficiently formal expression of sovereign interests to trigger the act of state doctrine and does not fall within any exception for ministerial or "commercial" acts, because it may involve national security considerations that "are far from routine" (*id.* at A12-A13). But the court nevertheless found the act of state doctrine inapplicable (*id.* at A13-A21). It noted that respondent did not seek to have the contract invalidated or to recover damages from the Nigerian Government or its officials, and "the district court would be called upon simply to determine as a factual matter whether [Kirkpatrick's] alleged bribery of Nigerian officials motivated the award of the contract" (*id.* at A17-A18). The court therefore concluded that "the district court's dismissal was based on little more than speculation about the effect that [respondent's] lawsuit might have on relations between the United States and Nigeria" (*id.* at A17).

The court also declined to follow *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984), which held that judicial inquiry into whether bribery caused a foreign sovereign act was barred because it would "impugn or question the nobility of a foreign nation's motivation" (Pet. App. A15). The court below believed that the doctrine should not be applied "to allow litigants to shield themselves from the consequences of illegal conduct abroad" and should not "in all circumstances foreclose judicial scrutiny of the motivations behind the military procurement decisions of a foreign government" (*id.* at A15-A16). The court found support for this view in the Legal Adviser's letter, observing that "the State Department is satisfied that the conduct of American foreign policy relative to Nigeria will

not be compromised by orderly federal court adjudication of [respondent's] lawsuit" (*id.* at A19).[5]

SUMMARY OF ARGUMENT

I. Under the classic formulation of the act of state doctrine, "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). Redress for such acts ordinarily is available only in the courts of the other nation or through diplomatic means. As synthesized in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the doctrine has evolved from a rather rigid rule based on territorial sovereignty to a more flexible analysis based on international comity and the responsibility of the political Branches for the conduct of foreign relations.

In *Sabbatino* itself, the Court, consistent with the position of the Executive Branch, held that United States courts could not examine the validity of a Cuban expropriation decree under either Cuban or international law, because there was no governing treaty or unambiguous agreement on the controlling principles of international law and judicial inquiry might interfere with the Executive's conduct of foreign relations. But in two subsequent decisions, the Court, again in accordance with the Executive Branch's position, held that the act of state doctrine should not be applied where adjudication of the claims was consistent with equity, the underlying purposes of the doctrine, and the foreign relations interests of the United States. *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S.

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[5] The court read the Legal Adviser's suggestion that the district court exercise "caution and due regard for foreign sensibilities" as a "reminder" that "[f]oreign governments have often expressed their dissatisfaction with the wide discovery authorized under the Federal Rules" and that courts should "exercise appropriate supervision over discovery and other trial preparation to limit damage to foreign sensibilities" (Pet. App. A19-A20 n.11); see App., *infra*, 2a.

759 (1972); *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976).

II. A. Adjudication of respondent's claims would be consistent with principles of international comity that inform the act of state doctrine. In *Sabbatino* and other cases, the act of the foreign state itself was challenged under the law of that state or international law. Respondent's suit, by contrast, is brought against private parties and arises under provisions of United States law (RICO, the Robinson-Patman Act, and New Jersey law) that, in respondent's view, were directly applicable to petitioners' primary conduct. The interest of the United States in enforcing its laws weighs heavily in the comity analysis. Nor is there any conflict with Nigerian law on this point, because Nigeria, like virtually all countries, makes bribery of its public officials illegal. Moreover, because respondent has not sued Nigeria and does not allege violations of Nigerian law, the court will not be required to adjudicate the validity or enforceability of the contract under Nigerian law. Finally, although Nigeria's decision to award the contract to Kirkpatrick rather than respondent does not fall within any "commercial activity" exception to the act of state doctrine, it nevertheless is relevant that petitioners' alleged acts of bribery were designed to induce Nigerian officials to enter into a commercial relationship.

B. The constitutional underpinnings of the act of state doctrine confirm that dismissal of respondent's complaint is not required. Even private litigation challenging the sovereign act of a foreign state affects the foreign relations interests of the United States, the other country involved, and the community of nations—matters for which the President and Congress are responsible under the Constitution. A court therefore must give great weight to the views of the Executive Branch (and relevant acts of Congress) on whether a failure to give full effect to the sovereign act of a foreign state would be consistent with our foreign relations interests. Here, the act of state concerns arise because, in order to

prove that it was injured by reason of petitioners' alleged violation of United States law, respondent must show that Nigeria's award of the contract was caused by the alleged bribes. However, we have been advised by the Department of State that, in its judgment, adjudication of this case would not be inconsistent with the conduct of the Nation's foreign relations. We also have been advised that, in the absence of an affirmative representation to the contrary, adjudication of other private suits solely involving commercial bribery of foreign officials by United States firms would not embarrass the conduct of foreign relations. These assessments by the Department of State are consistent with the Foreign Corrupt Practices Act, in which Congress has made it a criminal offense for United States nationals to bribe foreign officials to obtain business.

C. The Court should not adopt a general rule that would attach dispositive significance to whether a suit involves only the "motivation" for, not the "validity" of, a foreign sovereign act. Some cases that concern only a foreign government's motivation plainly do raise significant act of state concerns. In this case, however, respondent's claims implicate only the allegedly corrupt personal motivations of individuals acting on behalf of the Nigerian Government, not the official purposes of the Nigerian Government itself in awarding the contract.

ARGUMENT

THE ACT OF STATE DOCTRINE SHOULD NOT BE APPLIED TO BAR ADJUDICATION OF RESPONDENT'S DAMAGE CLAIMS UNDER UNITED STATES LAW BASED ON PETITIONERS' ALLEGED BRIBERY OF NIGERIAN OFFICIALS TO OBTAIN A CONTRACT

The opinion in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), sets forth the Court's understanding of the origins, bases, and proper application of the act of state doctrine. The Court in *Sabbatino* identified the underpinnings of the doctrine in principles of comity among nations and the primary responsibility of the

political Branches—and especially the Executive Branch —in the area of foreign relations.

Although the Court's prior decisions had appeared to take a rather rigid view of the act of state doctrine, *Sabbatino* expressly declined to lay down or reaffirm any inflexible or all-encompassing rule for application of the doctrine in future cases. Consistent with *Sabbatino*, and in recognition of the widely divergent circumstances in which the issue may arise, we do not urge any rigid formula for the resolution of act of state cases generally. In particular, we do not urge the Court to choose among the expressions in judicial opinions and commentary that have variously sought to explain the act of state doctrine as a rule of judicial abstention,[6] an aspect of the political question doctrine,[7] a choice-of-law rule,[8] a broader conflict-of-laws rule that incorporates both choice-of-forum and choice-of-law notions,[9] or a principle of repose that treats the act of a foreign sovereign as conclusively settling its legality in the courts of the United States, much as the judgment of a court operates under principles of issue or claim preclusion.[10] Each of these analytical theories may furnish useful in-

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[6] *First National City Bank*, 406 U.S. at 773-776 (Powell, J., concurring); *Alfred Dunhill*, 425 U.S. at 715 (Powell, J., concurring).

[7] *First National City Bank*, 406 U.S. at 787-790 (Brennan, J., dissenting); *Alfred Dunhill*, 425 U.S. at 727-728 (Marshall, J., dissenting).

[8] *Alfred Dunhill*, 425 U.S. at 705-706 n.18 (opinion of White, J.); *id.* at 726 (Marshall, J., dissenting); Henkin, *Act of State Today: Recollections in Tranquility*, 6 Column. J. Transnt'l L. 175, 178 (1967).

[9] Restatement (Third) of the Foreign Relations Law of the United States § 443, reporters' note 1 (1987); Leigh & Sandler, Dunhill: *Toward a Reconsideration of* Sabbatino, 16 Va. J. Int'l L. 685, 709-718 (1976); *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 310 (1918).

[10] J. Dellapenna, *Deciphering the Act of State Doctrine*, Manuscript at 44-52 (1989) (to be published in 35 Vill. L. Rev.); *Ricaud*, 246 U.S. at 309; *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1113-1114 (5th Cir. 1985). Cf. *Hilton* v. *Guyot*, 159 U.S. 113 (1895).

sights in one setting or another. But at least for the case at hand, we believe that whatever guidance they impart is sufficiently subsumed in the more general understanding, synthesized in *Sabbatino*, that the doctrine "effectuate[s] general notions of comity among nations and among the respective branches of the Federal Government." *First National City Bank*, 406 U.S. at 762 (opinion of Rehnquist, J.). We therefore rest our submission on the identification of a number of factors that, under principles of comity and separation of powers, indicate that application of the act of state doctrine is not required in the circumstances of this case. Before turning to those considerations, however, we believe it appropriate to review the manner in which the act of state doctrine has evolved through this Court's decisions.

I. *SABBATINO*, ITS PREDECESSORS, AND ITS PROGENY

The act of state doctrine has gradually been transformed from a set of precepts based on strict notions of territorial sovereignty, requiring seemingly unquestioned deference by our courts to the acts of a foreign government within its territory, to a more flexible analysis in which the national interests of the United States may in certain circumstances require modification of the effect to be given to the act of a foreign state. In addition, because the decision whether to disregard a foreign act of state in United States courts often implicates important and sensitive foreign relations interests of the United States, and because the ascertainment, articulation and implementation of those interests is the responsibility of the political Branches, the Court has recognized in *Sabbatino* and other cases that the doctrine must respect the role of those Branches under established principles of separation of powers.

1.a. Although the origins of the act of state doctrine may be found in the earliest years of the Nation's jurisprudence,[11] the Court's seminal decision on the sub-

[11] The principle that courts of one nation will not sit in judgment on the acts of another was articulated (though not fully de-

ject is *Underhill* v. *Hernandez*, 168 U.S. 250 (1897). In *Underhill*, an American citizen brought suit in an American court against the commander of revolutionary forces who exercised full civil and military authority over a city in Venezuela, seeking damages (presumably under Venezuelan law) for illegal detention and related wrongs. The trial court directed a verdict for the commander, and this Court affirmed. 168 U.S. at 252-253. The Court explained its holding in what *Sabbatino* later described, 376 U.S. at 416, as the "classic American statement" of the act of state doctrine (168 U.S. at 252):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[12]

See also *Hatch* v. *Baez*, 7 *Hun.* 596 (N.Y. Sup. Ct. 1876).

b. In *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), the defendant was not, as in *Underhill*, the foreign official who committed the act of state, but rather an American company that allegedly induced the act. The Court nevertheless concluded that the *Underhill* principle applied. *American Banana* was a

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veloped) in early decisions of this Court. See *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812); *L'Invincible*, 14 U.S. (1 Wheat.) 238, 253 (1816); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 336 (1822). The doctrine is generally traced to *Blad* v. *Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992 (Ch. 1674), in which the English courts declined to question a patent granted by the King of Denmark. See *Sabbatino*, 376 U.S. at 416; see also *Duke of Brunswick* v. *King of Hanover*, [1848] 2 H.L.C. 1.

[12] The Court also noted that the commander acted to coerce the American plaintiff to operate the city water works for the benefit of the community and the revolutionary forces, not out of "malice or any personal or private motive." 168 U.S. at 254.

suit between two American companies under the antitrust laws of the United States, in which the plaintiff alleged that the defendant had caused the Government of Costa Rica to seize the plaintiff's banana plantation and railroad for the purpose of eliminating it as a competitor. In an opinion by Justice Holmes, this Court affirmed the dismissal of the complaint. The Court first held that the antitrust laws did not reach conduct occurring outside of the United States (213 U.S. at 357), a holding that has, of course, been rejected by subsequent decisions. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 704-705 (1962).

More pertinently, the Court also relied upon act of state principles (213 U.S. at 357-359):

> [T]he acts of the defendant in * * * Costa Rica * * * were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of [the Sherman Act]. * * *
>
> The fundamental reason why persuading a sovereign power to do this or that cannot be a tort * * * is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law.
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> * * * *
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> * * * As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. * * * A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Thus, in *American Banana*, the Court concluded that the defendant's conduct should not give rise to liability un-

der United States law (even assuming the antitrust laws otherwise applied in Costa Rica) because the plaintiff's injury was the direct effect of acts of the Costa Rican Government. Moreover, the defendant's conduct, including its inducement of the expropriation, appeared to be lawful under the law of Costa Rica.

c. The Court reiterated the rule of *Underhill* and *American Banana* in *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303-304 (1918)), and *Ricaud* v. *American Metal Co.*, 246 U.S. 304, 309 (1918). Those cases involved disputed title to property that was seized in Mexico by revolutionary forces that later were recognized by the Executive Branch as the government of Mexico. Relying on principles of separation of powers and comity, the Court gave effect to the seizures by sustaining the title of the party who claimed through a person who purchased from the Mexican Government after the seizure, rather than from the prior owner.

The Court first stressed that "[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government," and held that the courts could not question the Executive's recognition of the revolutionary forces that expropriated the property. *Oetjen*, 246 U.S. at 302-303. The Court then explained that the governing principle of *Underhill* and *American Banana*, which involved damage claims based upon torts allegedly committed in the foreign country, was equally applicable to a case involving title to property brought within the custody of the court. This was so, the Court reasoned, because the principle "rests at last upon the highest considerations of international comity and expediency," and "[t]o permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Oetjen*, 246 U.S. at 303-304.

At the same time, the Court rejected the contention that the rule of *Underhill* and *American Banana* deprives

a court of jurisdiction over a case involving the act of a foreign sovereign. Rather, the Court explained, it requires only that "when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision" (*Ricaud*, 246 U.S. at 309). Any remedy the losing claimant might have, the Court concluded, must be in the courts of Mexico or through diplomatic efforts of the Executive Branch. *Id.* at 310; *Oetjen*, 246 U.S. at 304.

2. It was against the background of these precedents that the Court reexamined the act of state doctrine in *Sabbatino*. See 376 U.S. at 416-418.[13] *Sabbatino* involved an expropriation by the Cuban Government of the property and rights of an American-owned Cuban corporation. The expropriation was challenged in United States courts on the ground that it violated Cuban and international law. The Court held that the expropriation must be given effect by United States courts and that the Cuban government, not the former American owners, was entitled to the proceeds of the sale of expropriated sugar.

In reciting the evolution of the doctrine (376 U.S. at 416-419) and finding it to be one of federal law (*id.* at 421-427), the Court examined the various justifications that had been offered for it. The Court rejected the view, implied by *Underhill*, *Oetjen*, and *American*

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[13] *Sabbatino* also cited *United States* v. *Belmont*, 301 U.S. 324 (1937), and *United States* v. *Pink*, 315 U.S. 203 (1942). 376 U.S. at 416-417. In those cases, the Court gave effect to the expropriation by the Soviet Union of all assets of Russian companies, including assets in the United States. Although the act of state doctrine ordinarily is limited to acts of a foreign sovereign that are effectuated within its own territory, the President had concluded an executive agreement with the Soviet Union, which included an assignment to the United States Government of the Soviet Union's claims against expropriated assets in the United States. For this reason, and because American claimants were not adversely affected, the Court found it to be consistent with the public policy of the United States to give effect to the Soviet decree even as it applied to such assets. *Pink*, 315 U.S. at 226-234.

Banana, that the act of state doctrine is compelled by the inherent nature of a foreign sovereign's authority within its territory. The Court noted that if a transaction takes place in one jurisdiction and the forum is in another, the forum state does not divest the other state of its territorial sovereignty if it applies its own law to the controversy or dismisses the suit. The Court likewise rejected the view that the doctrine is required by international law (as evidenced by the practice of nations), since most countries in fact failed to adhere to it rigidly. Finally, the Court held that, although the conduct of the Nation's foreign relations is committed by the Constitution to the Executive and Legislative Branches, the Constitution does not thereby render every case touching upon foreign relations a political question or irrevocably remove from the Judiciary the capacity to review the validity of foreign acts. See generally 376 U.S. at 421-423.

After putting these alternative rationales to one side, the Court reiterated that the doctrine rests in part on the principles of comity among nations articulated in *Underhill*, *Oetjen* and *Ricaud*. 376 U.S. at 416-418; cf. *The Schooner Exchange*, 11 U.S. (7 Cranch) at 136-137, 146-147. It further held that, although the doctrine is not constitutionally compelled, it does have " 'constitutional' underpinnings." 376 U.S. at 423. Thus, in the Court's view, the doctrine arises out of the basic relationships among the Branches under the separation of powers and "concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations." *Ibid.* Specifically, it "expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Ibid.*

Applying these principles, the Court held that United States courts could not inquire into the validity of the

Cuban expropriation decree. It noted that judicial inquiry into the validity of a foreign official's actions under the law of his own state "would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question." 376 U.S. at 415 n.17, citing *Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808). In holding that the courts likewise could not examine the validity of the expropriation under international law, the Court declined to "lay[] down or reaffirm[] an inflexible and all-encompassing rule," because the continuing vitality of the doctrine "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs." 376 U.S. at 427-428.[14] The Court therefore held that the courts "will not examine the validity of a taking of property within its own territory by a foreign sovereign government * * * in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." *Ibid.*

The Court found these principles barred adjudication of the claim in *Sabbatino*. Although the Department of State had taken the firm view in the diplomatic arena that the expropriation violated international law (376 U.S. at 432), the Court found no consensus among nations on that question (*id.* at 428-430) and therefore found that it was "not meet for adjudication by domestic tribunals" (*id.* at 429 n.26). The Court also feared that judicial determinations in a few individual cases regarding the validity of an expropriation under international

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[14] For example, the Court noted that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it would be for a court to render decisions regarding it. The Court also found it evident that "some aspects of international law touch much more sharply on national nerves than do others," and that "the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches." 376 U.S. at 428.

law could interfere with or embarrass the Executive Branch in its efforts to obtain compensation for *all* United States citizens through economic and political sanctions and diplomatic efforts, yet at the same time would prove ineffective to exert real pressure on the Cuban Government. *Id.* at 430-437.

3. Since *Sabbatino* was decided, the Court has held in two other cases that adjudication of the validity of a foreign act was not barred by the act of state doctrine in the particular circumstances presented. In *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), the Court held that a United States court could adjudicate the validity of a Cuban expropriation decree in the context of a counterclaim arising in a suit brought by an instrumentality of the Cuban Government. The Solicitor General in that case filed with the Court a letter from the Legal Adviser of the Department of State, stating that the foreign policy interests of the United States do not require application of the doctrine to bar adjudication of a counterclaim or setoff when the foreign state's claim arises from a relationship existing at the time of the expropriation and the amount of relief sought is limited to the amount of the foreign state's claim. See *id.* at 781 (Brennan, J., dissenting). Three Justices, explicitly adopting the so-called "*Bernstein* exception," [15] took the position that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts" (*id.* at 768) (opinion of Rehnquist, J.)). Those Justices further noted (*id.* at 768-769), as did Justice Douglas in his separate opinion (*id.* at 770-773), that allowing the counterclaim also was consistent with the principles of equity set forth in *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955), which held that sovereign immunity did not bar assertion of a counterclaim against a foreign

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[15] See note 4, *supra*, and page 32 and note 32, *infra*.

sovereign that invoked the jurisdiction of our courts.[16]

In *Alfred Dunhill of London, Inc.* v. *Cuba*, 425 U.S. 682 (1976), the Court held that Cuba's refusal to pay a commercial debt did not constitute an act of state in the absence of some statute, decree or order of the Cuban Government indicating that it had repudiated the debt or confiscated the amounts due. *Id.* at 690-695. In a plurality opinion for four Members of the Court, Justice White further concluded that the act of state doctrine should not in any event be extended to the repudiation of a commercial debt. *Id.* at 695-706. The plurality placed particular reliance on the Executive Branch's statement, which indicated that purely commercial conduct, as opposed to public or governmental acts, should not be regarded as the sort of conduct to which the doctrine applies. That position made clear that no embarrassing conflicts with the Executive Branch would ensue from adjudicating the validity of the repudiation. *Id.* at 696-698.

As these two cases demonstrate, the Executive Branch has moved incrementally in suggesting areas in which the act of state doctrine need not be applied in order to protect the foreign policy interests of the United States. And the Court likewise has moved incrementally in adjusting the application of this once-rigid doctrine in light of the flexibility suggested by *Sabbatino*, in order to accommodate changing developments in the international community (*Alfred Dunhill*) or equitable factors (*First National City Bank*). Indeed, the *result* reached in each of the Court's most recent cases—*Sabbatino*, *First National City Bank*, and *Alfred Dunhill*—was that urged by the Executive Branch, despite some divergence

[16] In a separate opinion that expressly departed from the reasoning of *Sabbatino*, Justice Powell concurred in the judgment because it did not appear that an exercise of jurisdiction would interfere with delicate foreign relations conducted by the political Branches (406 U.S. at 773-776). The four dissenting Justices concluded that the act of state doctrine was applicable to the counterclaims. Like Justice Powell (*id.* at 773) and Justice Douglas (*id.* at 772-773), they did not believe that a "*Bernstein* exception" should be recognized (*id.* at 776-777, 782-793 (Brennan, J., dissenting)).

in the supporting rationale. As we explain below, our submission in this case builds upon the approach both we and the Court have taken in *Sabbatino* and subsequent cases, but finds support in principles articulated in the Court's earlier cases as well.

II. PRINCIPLES OF SEPARATION OF POWERS AND INTERNATIONAL COMITY SUGGEST THAT APPLICATION OF THE ACT OF STATE DOCTRINE IS NOT REQUIRED IN THIS CASE

Both the Court's general articulation of the bases for the act of state doctrine in principles of separation of powers and comity, and the Court's application of those principles in *Sabbatino* and other cases, suggest that respondent's claims in this case need not be barred. As we explain in Part A, several considerations of international comity suggest that the act of state doctrine need not be applied in this case. These same considerations also have informed the determination by the Department of State that the conduct of the foreign relations of the United States would not be adversely affected by adjudication of respondent's claims. As we explain in Part B, that judgment regarding the foreign relations context of the case—and of the requirements of international comity in this setting—is entitled to great weight.

A. International Comity

"'"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.'" *Societe Nationale Industrielle Aerospatiale* v. *United States District Court*, 482 U.S. 522, 543-544 n.27 (1987) (quoting *Hilton* v. *Guyot*, 159 U.S. at 163-164). As *Societe Nationale* and *Hilton* v. *Guyot* show, the courts are called upon in a variety of circumstances to determine the relationship between the laws and official acts of the

United States and those of foreign countries—often in suits between private parties that do not implicate substantial exercises of sovereign authority by another nation.

In the context of the act of state doctrine, however, the national sensibilities that principles of comity seek to accommodate may be present with particular intensity and significance. This is because the doctrine typically applies to discrete acts of a foreign government that represent a deliberate and focused exercise of sovereign authority, often in relation to particular property, transactions, or persons. It therefore is with good reason that the courts have historically given effect to the sovereign acts of other nations, and that, under *Sabbatino*, they properly look to the views of the coordinate Branches and their place in the Constitutional structure in deciding whether to adhere to or depart from that practice. Here, we believe that considerations of comity do not require that respondent be precluded from litigating its claims.

1. In *Sabbatino* and many of the Court's other act of state cases, the act of a foreign sovereign itself was challenged on the ground that it was illegal under that nation's law or international law. There was no suggestion that the primary conduct at issue was directly governed by United States law. This case is, obviously, different. Respondent's suit is brought against private parties who are United States nationals, not against the Government of Nigeria or its officials, and the suit arises under laws of the United States that, in respondent's view, directly applied to petitioners' primary conduct.

In particular, respondent seeks to recover treble damages under RICO for injuries sustained in its business or property as a result of petitioners' alleged racketeering activities. 18 U.S.C. 1964(c). RICO, and the mail and wire fraud statutes that it incorporates,[17] make manifest that the United States has (and has asserted) a strong

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[17] See 18 U.S.C. 1961(1), defining the term "racketeering activity" to include any act that is indictable under 18 U.S.C. 1341 (relating to mail fraud) or 1343 (relating to wire fraud).

interest in protecting the channels and instrumentalities of the interstate and foreign commerce of the United States against uses intended to perpetrate fraud and corruption. Just as RICO prohibits racketeering activities designed to corrupt domestic governmental bodies through bribery (cf. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2897 (1989); *Town of Kearney* v. *Hudson Meadows Urban Renewal*, 829 F.2d 1263, 1268-1269 (3d Cir. 1987)), it also prohibits such activities directed to the decision-making processes of foreign governments, where the jurisdictional prerequisites of the statute are otherwise met. Petitioners do not contend otherwise. Cf. *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985).[18] Petitioners likewise do not challenge the court of appeals' holding (Pet. App. A29-A30) that commercial bribery violates Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c), and is actionable under 15 U.S.C. 15.[19] The interest of the United States in enforcing Acts of Congress that apply to the conduct at issue, even though that conduct had extraterritorial effects as well, is an important factor in the comity analysis. See *Societe Nationale*, 482 U.S. at 545 n.29.

2. It is true that the laws of Nigeria may also have applied to petitioners' primary conduct, insofar as that country had jurisdiction over persons involved in efforts to corrupt its governmental processes. But there is no conflict between the governing laws of the two nations in this respect, since Nigeria, like virtually all countries, prohibits the payment of bribes to its officials in connection with the performance of their duties.[20] In this re-

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[18] The Court did not grant review of the court of appeals' holding (Pet. App. A22-A24) that the complaint sufficiently alleges a pattern of racketeering activity under RICO.

[19] See also *Grace* v. *E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976); *Rangen, Inc.* v. *Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966), cited in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972).

[20] See Decree No. 38, §§ 1-8 (Nov. 22, 1975) (J.A. 146-164, 182-211). See also H.H. Marshall, *The Laws of Northern Nigeria*,

spect, the laws of the two nations that address the primary conduct at issue do not, standing alone, suggest that adjudication of respondent's claims under United States law would offend principles of comity. Compare *Societe Nationale*, 482 U.S. at 541-546.

This conclusion is consistent with the decision in *American Banana*, the Court's leading case considering the act of state doctrine in a suit arising directly under United States law. The act of state ruling there rested in large part on the premise that the conduct of the defendant, including its efforts to persuade the Government of Costa Rica to expropriate the competitor's land, was legal under the laws of that country. See 213 U.S. at 357-359 (quoted at page 12, *supra*). This reading of *American Banana* is confirmed by *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), which was an injunctive action alleging that the defendants had conspired in the United States to monopolize and restrain trade in sisal by, *inter alia*, securing passage of favorable legislation in Mexico. In holding that the complaint stated a valid claim for relief, this Court distinguished *American Banana* as involving "acts done outside the United States and not unlawful by the law of the place" (274 U.S. at 276). Here, as we have said, conduct such as that alleged by respondent is illegal under the law of Nigeria.

Moreover, in *Sisal Sales*, "[t]he United States complain[ed] of a violation of their laws within their own territory by parties subject to their jurisdiction, not

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ch. 89, §§ 115-122 (1965); D. Kingdon, *The Laws of the Federation of Nigeria and Lagos*, Criminal Code, ch. 42, §§ 98-101, 104 (1958). The legislative history of the Foreign Corrupt Practices Act shows Congress's understanding that "virtually every country has its own laws against bribery, although some are not vigorously enforced." S. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976). See also J.A. 176-178 (survey of antibribery laws of 65 nations). Different considerations would be raised if the receipt of payments was not illegal under the law of the other country. The FCPA contains express exceptions for such situations. 15 U.S.C. 78dd-1(c)(1), 78dd-2(c)(1).

merely of something done by another government at the instigation of private parties" (274 U.S. 276). Although "the conspirators were aided by discriminating legislation," they were "within the jurisdiction of our courts and [could] be punished for offenses against our laws" (*ibid.*). Similarly here, respondent complains of injuries sustained as a result of alleged violations of United States law committed by persons within the legislative jurisdiction of the United States. Equitable considerations, which have been deemed relevant under the act of state doctrine,[21] suggest that an act "done by another government" at the allegedly corrupt "instigation of private parties" should not stand as a bar to a suit against those private parties, if the suit can proceed in a manner that is consistent with foreign relations concerns.[22]

3. Because respondent has brought this action against petitioners, not the Government of Nigeria or its officials, the courts below would not be required to adjudicate the validity of an act of the Nigerian Government under principles of Nigerian law. That factor, too, diminishes the potential for conflicts between the laws and interests of the two nations. It also distinguishes this case from *Underhill*, *Sabbatino*, and other cases in which the suit squarely challenged an exercise of sovereign authority.

At least in the present context, this conclusion is not altered by the fact that adjudication of respondent's claims may require a United States court to determine whether the award of the contract was caused by bribes. The issue of causation would be addressed only to determine the *domestic* consequences of petitioners' conduct, by identifying the intended and foreseeable consequences

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[21] See *Alfred Dunhill*, 425 U.S. at 703-704; *First National City Bank*, 406 U.S. at 768-769 (opinion of Rehnquist, J.); *id.* at 770-773 (Douglas, J., concurring).

[22] This is not a situation, like that in *Sabbatino*, where the Executive Branch is seeking redress from the foreign sovereign itself for injuries sustained by United States nationals and the adjudication of a private suit could interfere with those diplomatic efforts.

abroad of the acts they committed within the legislative jurisdiction of the United States.[23] Nor is a different conclusion required because such an adjudication may establish an evidentiary basis for inferring that Nigerian officials may have violated Nigerian law, thereby permitting Nigeria to regard the contract as void or voidable.[24] Respondent does not request the United States

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[23] Because the act of state doctrine requires that the foreign sovereign's *act*, not simply its law, be given controlling effect, the doctrine has been described as a rule of repose, similar to issue or claim preclusion in judicial proceedings. See J. Dellapenna, note 10, *supra*, at 44-52. Under this view, the act of a foreign state is analogous to the judgment of a court that conclusively resolves all relevant legal issues under controlling law. It is significant for purposes of this analogy that corruption of the court, unlike mere error in its application of governing law, is an accepted ground for the court to set aside its judgment—or, in appropriate circumstances, for allowing a collateral attack on the judgment in a separate proceeding in another forum. Restatement (Second) of Judgments §§ 70(1)(a) and comment b, 82 (1982). Here, because respondent's claims of corruption arise under United States law and are principally brought against other United States nationals, a court of this Nation may be a convenient and suitable forum in which to litigate those claims, if the foreign policy interests of the United States do not require the court to stay its hand. Cf. *id.* § 82 and comment b.

[24] To be sure, if the Nigerian Government formally determined the contract to be void or rescinded the contract because it was tainted by corruption (and therefore voidable), there would be less basis for the contention that adjudication of respondent's claims under United States law based on the same transaction would implicate act-of state concerns. Compare *Steele* v. *Bulova Watch Co.*, 344 U.S. 280, 285, 288-289 (1952).

Nigerian courts have held that illegality renders a contract invalid. *Sodipo* v. *Lemninkainen Oy*, [1986] 1 N.W.L.R. 220, 229, 232-236 (Sup. Ct. Nigeria); see also *George* v. *Dominion Flour Mills Ltd.*, [1963] 1 All. N.L.R. 71, 73-74 (Fed. Sup. Ct. Nigeria). Under these authorities, it would appear that violation by a Nigerian official of the proscription against bribery would render his award of a government contract invalid and the contract itself void (or voidable at the option of the government). See also J. Orojo, *Nigerian Commercial Law & Practice* 73-74 (1983); O. Achike, *Nigerian Law of Contract* 189-190 (1972). That also is the rule under English law (see, *e.g.*, *City of London Electric Light-*

courts actually to adjudicate any issues arising under Nigerian law that may be implicated by the evidence adduced. Thus, irrespective of the outcome of respondent's suit, the contract will retain whatever effect it otherwise has as a matter of *Nigerian law*, and that effect presumably will continue to be recognized in the United States. The contract simply will not be given the further effect, under the act of state doctrine, of precluding all inquiry by a United States court into the circumstances surrounding its formation, insofar as they are material to the adjudication of an alleged violation of *United States* law. Cf. *Societe Nationale*, 482 U.S. at 542-546.[25] Compare *Angle* v. *Chicago, St. P., M. & O. Ry.*, 151 U.S. 1, 16-22 (1894); *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 175-177 (1965).

This analysis is supported by the decision in *Continental Ore*. There, the defendants had conspired in the United States to establish an exclusionary customer allocation program for sales of vanadium in Canada by utilizing the authority of a wholly owned subsidiary of

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ing Co. v. *Mayor of London*, [1903] App. Cas. 434 (H. L. (E.)), aff'g [1901] 1 Ch. 602, 613 (Rigby, L.J.)), which the law of Nigeria, as a former British colony, generally mirrors. See *Sodipo* v. *Lemminkainen Oy*, 1 N.W.L.R. at 232; T. Elias, *The Nigerian Legal System*, 12, 17-21, 214 (1963). Similarly, contracts between the United States and a private party that are tainted by corruption may be rescinded by the United States. *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520, 563-566 (1961); *Pan American Petroleum & Transp Co.* v. *United States*, 273 U.S. 456, 500 (1927); *Crocker* v. *United States*, 240 U.S. 74, 81 (1916).

[25] Unlike the French blocking statute in *Societe Nationale* (482 U.S. at 526 n.6, 544-545 n.29), there is no suggestion here that the Nigerian statutes governing the award of military contracts or prohibiting bribery were intended to bar an inquiry into such matters by a United States court. See *Angle* v. *Chicago, St. P., M. & O. Ry.*, 151 U.S. 1, 21-22 (1894). We express no view on whether other aspects of international comity that are distinct from those informing the act of state doctrine—*e.g.*, principles of comity concerning the production of evidence in Nigeria or pertaining to the affairs of its Government—may properly be invoked in further proceedings in this case.

one of the defendants as the exclusive purchasing agent for the Canadian government. In upholding the claim, the Court analogized the case to *Sisal Sales*, again distinguishing *American Banana* (370 U.S. at 705 & n.13), and continued (*id.* at 706):

> In the present case [plaintiffs] do not question the validity of any action taken by the Canadian Government or by its Metals Controller. * * * As in *Sisal*, the conspiracy was laid in the United States, was effectuated both here and abroad, and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.
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> * * * [T]here is no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from Continental be stopped.

Here, as in *Continental Ore*, there is no indication that the specific acts of petitioners on which respondent bases its claim of injury—namely, alleged racketeering activities leading to the payment and receipt of bribes by the agent of a foreign government—were approved by the Nigerian Government itself.[26]

4. It also is significant for the comity analysis that the payments allegedly were made to induce officials of the Nigerian Government to enter into a commercial relationship, not to perform acts that would remain of a distinctly sovereign nature in all respects. As explained above, four Justices concluded in *Alfred Dunhill* that the

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[26] In addition, because there is no indication that the Nigerian Government has officially concluded that the contract was unaffected by any payments that might have been made by petitioners or that the contract should be ratified despite any such defects, a ruling by a United States court that the contract was awarded because of corruption in which United States nationals were involved would not exhibit a lack of respect for any *specific* determination by the foreign government regarding the integrity or continuing force of its contracting decision. Cf. *Hilton* v. *Guyot*, 159 U.S. at 163-164; compare *Alfred Dunhill*, 425 U.S. at 695.

act of state doctrine should not be applied to bar adjudication of a claim based on Cuba's repudiation of a commercial obligation. 425 U.S. at 695-706 (opinion of White, J.). The plurality relied on several factors. First, this result would not create a threat of embarrassing conflicts with the Executive Branch in its conduct of foreign relations; indeed, the Department of State took the position that purely commercial activity, as distinguished from public or sovereign acts, should not be regarded as the sort of conduct to which the doctrine applies. 425 U.S. at 696-698. Second, under the restrictive theory of foreign sovereign immunity adopted by the Executive Branch in the 1952 "Tate Letter," a sovereign is not immune from suit for its commercial acts. *Id.* at 698-703, 705. Third, adjudicating the validity of a sovereign's commercial acts, as opposed to its governmental acts, is less likely to constitute an affront, since in their commercial capacities foreign governments do not exercise powers unique to sovereigns and are subject to generally accepted standards of conduct; conversely, refusing to adjudicate could cause unwarranted hardship for persons engaged in international commerce. *Id.* at 703-704.

The factors upon which the *Alfred Dunhill* plurality relied suggest a similar result here. We do not take issue with the court of appeals' holding that the decision to award a military construction contract reflects a sufficiently formal and substantial expression of governmental interests to be regarded as a sovereign act for purposes of the act of state doctrine. Pet. App. A12-A13, A57; see also *Williams* v. *Curtiss-Wright Corp.*, 694 F.2d 300, 302 (3d Cir. 1982); *Northrop Corp* v. *McDonnell Douglas Corp.*, 705 F.2d 1030, 1048 (9th Cir), cert. denied, 464 U.S. 849 (1983). But the contractual relationship between Nigeria and Kirkpatrick that commenced upon the award of the contract *would* be regarded as "commercial activity" for purposes of the Foreign Sovereign Immunities Act, 28 U.S.C. 1605(a)(2).[27] It

[27] Under the FSIA, the commercial character of an activity is determined "by reference to the nature of the course of conduct or

therefore presumably would also be regarded as commercial for purposes of the "commercial activity" exception to the act of state doctrine that was endorsed by the plurality opinion in *Alfred Dunhill*, since that view was based in part on sovereign immunity principles that are now incorporated in the FSIA.[28] Thus, although this case, unlike *Alfred Dunhill*, does not involve conduct by a foreign government in the course of an on-going commercial relationship, the fact that petitioners' alleged conduct related to a prospective commercial relationship —and therefore resembled ordinary commercial bribery between private parties (see, *e.g.*, *Perrin* v. *United States*, 444 U.S. 37 (1979))— is relevant in deciding whether the international comity aspects of the act of state doctrine require that it be applied to bar adjudication of this case. Cf. *Alfred Dunhill*, 425 U.S. at 703-704 (opinion of White, J.).[29]

B. Separation Of Powers

The result suggested by principles of international comity is confirmed by reference to the "constitutional underpinnings" of the act of state doctrine. Those underpinnings, and their relation to principles of comity, require consideration of the roles of the political Branches

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particular transaction or act, rather than by reference to its purpose." 28 U.S.C. 1603(d). "Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 16 (1976).

[28] The House Report on the FSIA expressed approval of the Solicitor General's position on the act of state issue in *Alfred Dunhill*. H.R. Rep. No. 1487, *supra*, at 20 n.1.

[29] The instant case also differs from those in which American defendants were alleged to have corruptly induced a foreign sovereign to award rights to exploit natural resources. *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.*, *supra*; *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 92 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950 (1972). The development of a nation's depletable resources implicates its distinctly sovereign interests to a greater extent than does the award of a procurement contract, which may be of only episodic interest to its government.

in the conduct of foreign affairs—and, accordingly, of the relation of those Branches to the subject of the litigation.

1. When the official act of a foreign government in matters affecting its sovereign interests is questioned in the courts of the United States, even in a suit between private parties, the litigation necessarily affects the national interests of the United States and the other country (as well as other countries), not merely those of the private litigants. Any assessment of the respective national interests in this setting must be greatly influenced by the foreign policies and sensibilities of the two nations and other nations and by the standards of conduct among nations (and their respective nationals) that are adhered to and advocated by the United States. Under the Constitution, those are subjects that the President and Congress have primary responsibility for ascertaining, articulating and implementing. See *United States* v. *Curtiss Wright Export Corp.*, 299 U.S. 304, 319 (1936); U.S. Const., Art II, § 2, Cl. 2 (Treaty Clause); Art. I, § 8, Cl. 3 (Congress shall have power to "regulate Commerce with foreign Nations"); Art. I, § 8, Cl. 10 (Congress shall have power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"). Accordingly, a United States court should give great weight to the views of the Executive Branch (and relevant acts of Congress) as to whether the national and foreign relations interests of the United States suggest that the applicable rule of decision should be supplied by the act of a foreign sovereign or drawn from some other source, such as domestic or international law.

This understanding is reflected in *Sabbatino* itself. There, as we have noted, the Executive Branch had strenuously urged in the diplomatic arena that the expropriation by the Cuban Government violated principles of international law advocated by the United States. But the Executive Branch took the equally firm position in this Court that, for reasons pertaining to the conduct of the Nation's foreign relations, those principles should

not be applied by United States courts to determine whether the expropriation was valid for purposes of resolving disputed questions of title to property. See U.S. *Sabbatino* Br. 25-34. Thus, the Executive Branch argued, in substance, that the principles of international law that it espoused on a nation-to-nation basis were not self-executing and did not create private rights that were judicially enforceable in United States courts. Compare *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 109 S. Ct. 683, 692 (1989).

This Court agreed—largely for the reasons advanced by the Executive Branch—that "the matter [was] not meet for adjudication by domestic tribunals." 376 U.S. at 429 n.26. The result was to require recognition of the Cuban decree as the rule of decision. A different position of the Executive Branch in other circumstances (that the foreign relations interests of the United States do not require unquestioning recognition of the act of a foreign sovereign) would be entitled to great deference as well. This Court has recognized in other settings that, even in the absence of a formal treaty, the actions of the Executive in the conduct of foreign relations may create a rule of law to be applied in pending cases. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 685 (1981); *United States* v. *Pink*, 315 U.S. at 226-234.

2. These constitutional underpinnings of the act of state doctrine do not suggest that it must be applied to bar respondent's suit here.

a. In *Sabbatino*, one of the factors upon which the Court relied in declining to adjudicate the validity of the expropriation decree under international law was the absence of a "treaty or other unambiguous agreement regarding controlling legal principles." 376 U.S. at 428. Thus, one aspect of the separation of powers component of the act of state doctrine concerns the allocation among the Branches of responsibility for articulating the rule of law that should be applied in evaluating the primary conduct at issue. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 312-317 (1981). That aspect is not at issue

in this case, because the Acts of Congress (and New Jersey law) upon which respondent relies supply the substantive standards for the district court to apply in evaluating petitioners' primary conduct.[30]

b. Respondent of course must further prove that it was injured by reason of the primary conduct that was made illegal under domestic law, and it therefore must make a prima facie showing that payments allegedly made by petitioners caused Nigerian officials to award the contract to them. It is this feature of respondent's cause of action that triggers the separation of powers component of the act of state doctrine, because it implicates the foreign relations concerns for which the political Branches have primary responsibility.

However, we have been advised by the Department of State that, in its judgment, adjudication of this case would not be inconsistent with the conduct of the foreign relations of the United States, even though the district court would be required to determine whether the contract was awarded to petitioners because of payments they made to Nigerian officials. See App., *infra*, 1a-2a. To be sure, where the act of a foreign government is itself a direct and immediate cause of the plaintiff's injury, an inquiry into the "motivation" for that act might in other circumstances raise significant act of state concerns, since the effect of such an inquiry is to impugn the integrity or ingenuousness of the act, even if its validity is not questioned. See pages 37-39, *infra*. But in this regard, we have been further advised by the Department of State that, in the absence of an affirmative representation to the contrary by the Executive Branch, adjudication of private suits under United States law that solely involve commercial bribery of foreign officials

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[30] In *Sabbatino*, a treaty or unambiguous agreement would have served the additional purpose of assuring the Court that application of the principles of international law it was urged to invoke were accepted by Cuba or at least were consistent with general principles of international comity. In this case, that purpose is served by the virtual universality of prohibitions against bribery, including those of Nigeria. See note 20, *supra*.

by United States firms would not generally embarrass the conduct of foreign relations, so long as the validity of the act of the foreign state is not questioned. App., *infra*, 1a-2a.[31]

In informing the Court of this assessment, we do not urge that the view of the Executive Branch that the adjudication may go forward would be binding on the courts—a position endorsed by the Second Circuit in *Bernstein* v. *N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (1954), as that decision was understood by this Court in *First National City Bank*.[32] In general, however, where application of the doctrine may turn on an assessment of the foreign policy interests of the United States, including an assessment of the impact of judicial proceedings in this country on the sensibilities of foreign nations, a court should not undertake to determine those

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[31] Reference to the views of the Executive in this fashion is supported by the Hickenlooper Amendment, 22 U.S.C. 2370(e)(2). That Amendment provides that no court in the United States shall decline, on act of state grounds, to make a determination on the merits under international law in certain cases involving a confiscation of property, unless, inter alia, "the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." We note as well that the letter of the Legal Adviser upon which the plurality relied in *First National City Bank* took the position that counterclaims should not be permitted to proceed if the foreign policy interests of the United States require application of the act of state doctrine in the particular case. See 406 U.S. at 781 (Brennan, J., dissenting).

[32] As explained above (see pages 17-18 and note 16, *supra*), although the opinion for three Justices in *First National City Bank* endorsed a "*Bernstein* exception," the concurring and dissenting opinions rejected that approach. This case of course differs from *First National City Bank* because it does not involve a direct challenge to the validity of the foreign sovereign act itself, and we do not suggest in this case that the courts below should be permitted to adjudicate that question. We suggest only that the Court should give great weight to the Executive Branch's determination that, in the commercial bribery setting, an inquiry into whether that act was corruptly induced by United States nationals would not, as a general matter, embarrass the conduct of foreign relations.

questions for itself. Rather, as the district court did in this case, it should solicit the views of the Executive Branch in these matters, and should give those views the greatest deference in determining whether foreign policy concerns, together with considerations made relevant by other components of the act of state doctrine, require that the court give effect to the act of a foreign state.[33]

c. The foreign policy assessment by the Department of State is consistent with the legislative determination underlying the Foreign Corrupt Practices Act. The FCPA makes it a criminal offense for any "domestic concern"[34] to use the mails or any instrumentality of interstate or foreign commerce to pay or offer anything of value to an official of a foreign government for the purpose of influencing him to assist the domestic concern to obtain or retain business with the foreign government or any other person. 15 U.S.C. 78dd-2(a), (g) and (h)(5).[35] This prohibition was enacted in 1977[36] in response to an investigation by the Securities and Exchange Commission revealing a widespread practice among more than 300 Americans companies of making payments, totalling hundreds of millions of dollars, to officials of foreign governments in order to secure busi-

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[33] Thus, even in the commercial bribery context, if a trial court determines that distinct foreign policy interests of the United States may be involved, it should request the views of the Department of State, through the Department of Justice.

[34] The term "domestic concern" is defined to mean a citizen or resident of the United States, or any corporation organized under the laws of a State or doing business in the United States. 15 U.S.C. 78dd-2(h).

[35] Similar prohibitions are imposed on certain issuers of securities covered by the federal securities laws. See 15 U.S.C. 78dd-1. Both provisions also bar payments to a foreign political party for the same purposes. 15 U.S.C. 78dd-1(a)(2), 78dd-2(a)(2).

[36] Pub. L. No. 95-213, §§ 103, 104, 91 Stat. 1495, 1496. The FCPA was revised and reenacted by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1415.

ness with them. S. Rep. No. 114, 95th Cong., 1st Sess. 3 (1977).

Congress concluded that such payments seriously undermine the foreign policy interests of the United States. The House Report explained that "[t]he revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." H.R. Rep. No. 640, 95th Cong., 1st Sess. 5 (1977). The Senate Report on a predecessor bill further observed that payments to foreign officials by American companies "undermine[] the foreign policy objective of the United States to promote democratically accountable governments and professionalized civil services in developing countries." S. Rep. No. 1031, 94th Cong., 2d Sess. 4 (1976). See also S. Rep. No. 85, 100th Cong., 1st Sess. 46-47 (1987).

Congress recognized that it was relatively unusual to give extraterritorial effect to United States law, but it believed that overriding interests of this Nation justified doing so, especially since the statutory proscription reaches only United States nationals and other persons having a substantial nexus to the United States and only conduct that has a direct effect upon the United States. See S. Rep. No. 1031, *supra*, at 5, 15-17; H.R. Rep. No. 640, *supra*, at 12 & n.2. Congress also rejected the contention that no legislation should be enacted because some foreign countries might resent attempts to export American morality or impose American standards on transactions taking place there.[37] The Senate Committee, for example,

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[37] In *American Banana*, 213 U.S. at 356-358, the Court applied strict territorial principles to the application of United States law. But it also recognized that one sovereign nation, in cases affecting its "national interests," might go further and seek to punish acts committed by its citizens within another jurisdiction, as Congress had done under the Logan Act (Rev. Stat. § 5335 (1875), now codified at 18 U.S.C. 953). That Act proscribes criminal correspondence by United States citizens with foreign governments to

expressed the belief that "most countries would welcome a greater effort by the United States to discourage offensive conduct by U.S. companies, wherever their activities may take place," and it quoted the opinion of the Attorney General of Botswana that "most Third World countries would want to cooperate to the fullest extent possible, with the U.S. and other home countries," to make sure that offenders are punished (S. Rep. No. 1031, *supra*, at 4, 5).

To be sure, respondent has not sought to bring this action under the FCPA, and there is substantial reason to doubt that the FCPA should be construed to confer an implied private right of action on a competitor. The FCPA expressly entrusts enforcement responsibility to the Attorney General and the SEC, who can take foreign policy considerations into account in deciding whether to pursue a particular investigation or civil or criminal prosecution. 15 U.S.C. 78dd-1, 78dd-2; see *Clayco*, 712 F.2d at 408-409. Furthermore, although the effect on domestic competition was one undesirable consequence of bribery of foreign government officials cited in the legislative history, the prohibited-payment provisions of the FCPA were not enacted for the especial benefit of competitors. Rather, Congress sought to benefit the Nation as a whole, by promoting what it believed to be the Nation's foreign policy interests and the interests of the entire business and financial community. See S. Rep. No. 114, 95th Cong., 1st Sess. 3-4 (1977); H.R. Rep. No. 640, *supra*, at 4-5. Finally, and significantly, an early version of the FCPA would have *expressly* conferred a private right of action on competitors (S. 3379, 94th Cong., 2d Sess. § 10 1976, *reprinted in* 122 Cong. Rec. 12,605, 12,607 (1976)), but the Senate Committee deleted that provision from the bill reported in the 94th Congress. S. Rep. No. 1031, *supra*, at 13. The Senate Report stated that the Committee "may offer a floor amendment relating to competitors rights of action" if

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influence their actions in disputes with the United States. See 213 U.S. at 356. The enactment of the FCPA has a similar thrust.

"more acceptable language" could be devised (S. Rep. No. 1031, *supra*, at 13), but no such amendment was offered or adopted.[38]

Because respondent does not urge the Court to recognize a private right of action under the FCPA, we do not take a definitive position on that question here.[39] But even if the FCPA cannot be enforced in a private civil action brought by a competitor, the congressional judgment embodied in the FCPA that bribery of foreign officials by United States nationals should be made illegal under United States law, and that cases concerning such conduct may be adjudicated in United States courts in some circumstances, accords with the State Department's foreign policy judgment that the act of state doctrine need not be applied as an absolute bar to all suits brought under other federal statutes reaching the same course of conduct.[40] By the same token, because the

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[38] The House Report stated that the Committee "intends that the courts shall recognize a private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery" (H.R. Rep. No. 640, *supra*, at 10). But during the debate on the Conference Report, Representative Devine stated that "the conferees did not intend to create a private right of action." 123 Cong. Rec. 38,778 (1977). Similarly, Senator Tower stated that although the House Report expressed an intent that the courts recognize implied private rights of action, "[t]his question was not considered in the Senate or during the conference, and thus [it] cannot be said that any intent is expressed at all on this issue." *Id.* at 38,602. He also observed that "[i]n view of the existing case law, it is difficult to believe that the courts would imply a cause of action in any event." *Ibid.*

[39] We also do not take a position on whether an implied right of action should be recognized on the part of shareholders under the accounting or prohibited-payment provisions of the FCPA.

[40] See *Sage Int'l* v. *Cadillac Gage Co.*, 534 F. Supp. 896, 905 (E.D. Mich. 1981); *Dominicus Americana Bohio* v. *Gulf & Western Indus.*, 473 F. Supp. 680, 690 (S.D.N.Y. 1979); contra *Clayco*, 712

FCPA vests enforcement responsibility in the Attorney General and the SEC, who may decline to proceed in a particular case if the foreign policy interests of the United States so require, the structure of the FCPA also reinforces our view that the Executive Branch must be afforded the opportunity, in appropriate circumstances, to suggest in a private civil action that those interests weigh against allowing the suit to proceed. Compare *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 147 (1812).

C. The Court Should Not Adopt A Rule That Turns Solely On Whether Only The "Motivation" For A Foreign Sovereign Act Is At Issue

We do not urge the Court to adopt a rule that would attach dispositive significance to the fact that this suit involves only the "motivation" for, rather than the "validity" of, a foreign sovereign act.[41] In our view, some cases that concern only a foreign government's "motivation" plainly *do* raise substantial act of state concerns. See *Societe Nationale*, 482 U.S. at 537 n.23 ("Both comity and concern for the separation of powers counsel the utmost restraint in attributing motives to sovereign states which have bargained as equals.")

For example, in *American Banana*, it could have been argued that the central issue was whether the decree was

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F.2d at 409. See also Note, *Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases*, 59 Notre Dame L. Rev. 455 (1984); Note, *Clayco Petroleum Corp.* v. *Occidental Petroleum Corp.: Should There Be a Bribery Exception to the Act of State Doctrine?*, 17 Cornell Int'l L. J. 407 (1984).

[41] We took the position in our amicus briefs at the petition stage in *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977); *Mitsui & Co.* v. *Industrial Inv. Dev. Corp.*, 445 U.S. 903 (1980); and *O.N.E. Shipping, Ltd.* v. *Flota Mercante Grancolombiana, S.A.*, 109 S. Ct. 303 (1988), that the act of state doctrine generally does not bar inquiry into the motivation for a foreign act, and the Legal Adviser reiterated that legal view in his letter to the district court in this case. As explained in the text, we propose a narrower approach to the "motivation" issue in this case.

"motivated" by the urgings of the United Fruit Company, rather than Costa Rica's own sovereign interests, because United Fruit presumably would have been liable under United States antitrust laws only if its actions were shown to have been the cause of the expropriation. Yet the suit was not permitted to go forward. In fact, the Court specifically noted that the suggestion that the perpetrator of the harm was merely the "tool" of the defendant "hardly could be listened to concerning a really independent state," and that it "of course" was "not alleged that Costa Rica stands in that relation to the United Fruit Company." 213 U.S. at 358-359. See also *Zschernig* v. *Miller*, 389 U.S. 429, 434, 436 (1968); *Langenegger* v. *United States*, 756 F.2d 1565, 1569 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985); *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, 77-78 (2d Cir. 1977), cert. denied, 434 U.S. 984 (1977); *Occidental Petroleum Corp.* v. *Buttes Gas & Oil Co.*, 331 F. Supp. 110-111 (C.D. Cal. 1971), aff'd, 461 F.2d 1261 (9th Cir. 1972), cert. denied, 409 U.S. 950 (1972); but see *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1539-1543 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C. Cir. 1986); cf. *First National City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 634 n.28 (1983).[42]

Conversely, other decisions that have been characterized as allowing a suit to go forward because only the "motivation" of the foreign government was at issue may be explained on the alternative ground that the act of the foreign government did not reflect an assertion of substantial sovereign interests bearing on the merits of the controversy, or that it was simply part of the con-

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[42] In other cases, the validity of an act of state might turn so directly on its purpose that an inquiry into the latter necessarily would implicate the former. See, *e.g.*, *Hunt* v. *Mobil Oil Corp.*, 550 F.2d at 77-78; cf. *IAM* v. *OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982).

text in which essentially private conduct caused the injury. See *Clayco*, 712 F.2d at 407 (distinguishing *Industrial Inv. Dev. Corp.* v. *Mitsui & Co.*, 594 F.2d 48 (5th Cir. 1979), cert. denied, 445 U.S. 903 (1980), on this ground); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1294-1295 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of America, N.T. & S.A.*, 549 F.2d 597, 605-608 (9th Cir. 1976); see also *Northrop Corp.* v. *McDonnell Douglas Corp.*, 705 F.2d at 1047-1049.

In this case, moveover, it is significant to the State Department's determination regarding the foreign policy interests of the United States that respondent's claims implicate the allegedly corrupt *personal* motivations of individuals acting on behalf of the Nigerian Government, not the official purposes of the Nigerian Government in awarding the contract. Cf. *Ex parte Young*, 209 U.S. 123 (1908). To be sure, such a suit may nevertheless be embarrassing to members of the government of the other nation involved, and it therefore may, in a sense, "embarrass" the conduct of the foreign relations of the United States. But the former consequence differs in principle from an affront to the sovereignty of the foreign nation itself, and the latter consequence is by no means inevitable. It may often be true, on balance and especially in the long run, that the foreign policy interests of the United States would be furthered by rooting out efforts by its nationals to corrupt the governmental processes of other nations. The government of the other nation also may have a strong interest in exposing and expunging corruption in its own affairs and cooperating to assure the availability of legal redress for injuries sustained (see *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355 (9th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1933 (1989)), or may be content to let matters unfold as they will in United States courts.[43]

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[43] Special considerations might weigh against permitting a suit that depended on proof that a law passed by the legislature of

We do not rule out the possibility that litigation in United States courts based on alleged corruption in the award of contracts or other commercially oriented activities of foreign governments could sufficiently touch on "national nerves" (*Sabbatino*, 376 U.S. at 428) that the act of state doctrine or related principles of abstention would appropriately be found to bar the suit.[44] But on the basis of the representations by the Department of State concerning the foreign relations interests of the United States in the setting of this case, we do not believe that the act of state doctrine should be regarded as a complete bar to such suits.

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another nation (as distinguished from an act committed in the execution of the law) was the product of corruption. *See Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 130-131 (1810). A suit that depended on proof of corruption of the head of state or head of government of another nation likewise might raise special sensitivities and countervailing considerations. A refusal to entertain such a suit would draw some support from the rule of absolute immunity for a head of state or head of government in United States courts (*The Schooner Exchange*, 11 U.S. (7 Cranch) at 137-138; cf. *Alfred Dunhill*, 425 U.S. at 698-703 (opinion of White, J.)), at least where the foreign sovereign has not dispensed with that immunity (cf. *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110-1111 (4th Cir.), cert. denied, 484 U.S. 890 (1987); *Republic of the Philippines* v. *Marcos*, 806 F.2d 344, 360-361 (2d Cir. 1986), cert. denied, 481 U.S. 1048 (1987)) or with any special protections that would otherwise be afforded by the act of state doctrine in this setting. *Republic of the Philippines* v. *Marcos*, 862 F.2d at 1360-1361.

[44] In addition, as the Legal Adviser cautioned in his letter to the district court (Pet. App. A34-A37), United States courts adjudicating such claims must take care in their control of discovery and related matters to demonstrate a due respect for sovereign interests expressed by the foreign state. See *Societe Nationale*, 482 U.S. at 545-546; Pet. App. A19-A20 n.11.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1989

APPENDIX

[SEAL]

United States Department of State

The Legal Adviser
Washington, D.C. 20520

July 25, 1989

The Honorable
Kenneth W. Starr,
The Solicitor General,
Department of Justice,
Washington, D.C.

Dear Judge Starr:

The views of this Department have been requested concerning the foreign relations implications of adjudication of the claims of the respondent Environmental Tectonics Corporation (ETC) in *W.S. Kirkpatrick & Co., Inc., et al.* v. *Environmental Tectonics Corp., International*, now pending in the Supreme Court on a writ of *certiorari* to the Court of Appeals for the Third Circuit.

We understand from the nature of the allegations made by ETC that in order to prevail at trial on the merits, it may well be necessary for ETC to offer evidence to establish that but for certain alleged payments by defendant Kirkpatrick to Nigerian Government officials, ETC, and not Kirkpatrick, would have been awarded the contract for the Nigerian Air Force aeromedical facility. Such evidence could involve the disclosure of the identity of the foreign officials alleged to have received such payments, and other matters as may be relevant to the motivation behind the award of the contract.

Any litigation that involves, directly or indirectly, a foreign government has the potential for affecting the relations of the United States with that country. We do not, however, regard a bare potential for affecting U.S.

foreign relations as sufficient, in and of itself, to warrant dismissal. Cases could arise which present an unacceptable risk that adjudication would embarrass the Executive Branch in its conduct of U.S. foreign relations, leading the Executive to suggest the desirability of judicial abstention. We do not regard *Environmental Tectonics* as such a case, and we do not see any foreign relations obstacles to its adjudication on the merits. We also believe that, in the absence of a representation to the contrary, the courts may properly assume that no unacceptable interference with U.S. foreign relations will occur on account of the adjudication of like cases.

I understand that some uncertainty in the foregoing regard may have arisen from my December 10, 1986 letter to the District Court, in which I noted *inter alia* that

> . . . inquiries into the motivation and validity of foreign states' actions and discovery against foreign government officials may seriously affect United States foreign relations. These concerns, in the context of this litigation, counsel that caution and due regard for foreign sovereign sensibilities be exercised at each relevant stage in the proceedings. Moreover, the court should endeavor to assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial.

659 F. Supp. at 1403. As the Court of Appeals concluded, these observations were intended to remind the trial court to exercise "appropriate supervision" over the trial process so as to "limit damage to foreign sensibilities." 847 F.2d at 1062, note 11.

Sincerely,

/s/ Abraham D. Sofaer
ABRAHAM D. SOFAER

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